ORION TOWER SDN BHD v. SHANGHAI CITY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN JC
[ORIGINATING SUMMONS: WA-24NCVC-746-04-2021]
20 SEPTEMBER 2022

Abstract – *If a plaintiff is able to prove that it suffered damages as a result of a particular wrongdoing, in this case, the wrongful entry of a caveat over a piece of land, and that the said damages are not remote pursuant to the normal rules in tortious claims, the sums claimed ought to be awarded against the defendant.*

TORT: *Damages – Assessment – Wrongful entry of caveat over land – Whether caveat entered bona fide with intention of protecting registrable interest – Whether there were damages caused following entering of caveat – Whether claims speculative – National Land Code, s. 329(1)*

The plaintiff applied for an assessment of damages, pursuant to s. 329(1) of the National Land Code ('NLC'), following the wrongful caveat entered by the defendant over a piece of land. The caveat persisted over the land for six months. The plaintiff sought the following damages: (i) losses and expenses incurred by the plaintiff for the six months' period when its financing facilities were unavailable and the plaintiff's contractors were not able to proceed with the development works; (ii) the legal fees and expenses incurred by the plaintiff in respect of the application to remove the caveat; and (iii) general damages. Objecting to the application, the defendant argued that (i) the damages claimed were not caused by the caveat entered as it would have naturally arisen from the plaintiff's project; and (ii) the damages were projection losses on the part of the plaintiff and the plaintiff had not shown actual damages caused by the entry of the said caveat. The defendant further contended that there ought to be a trial of the assessment of damages, pursuant to O. 37 r. 4 of the Rules of Court 2012.

Held (directing defendant to pay plaintiff RM20,000 in damages):

(1) The application for directions was filed by the plaintiff as to the conduct of the assessment proceedings. There was no order for the assessment to be undertaken by way of a trial and parties had agreed that the proceedings be undertaken through affidavits. If the defendant had wanted a trial of the said assessment proceedings and sought to cross-examine the deponents or witnesses, then the defendant should have raised this issue at the said notice for directions. Failure to do so would mean that the defendant agreed that the assessment would be undertaken by affidavit alone. Furthermore, even if the defendant wanted to cross-

examine the deponents of the plaintiff's affidavit, all was not lost before this hearing. The defendant could have filed an application to cross-examine the deponent of the plaintiff's affidavit under O. 38 r. 3 of the ROC. However, this was not done. (paras 8-10)

(2) The defendant's caveat should not have been entered on the land. It was not entered *bona fide* with the true intention of protecting any registrable interest, in line with the NLC. The caveat was intended to scuttle the project, in view of the defendant's grouses with the plaintiff. As the defendant did cause a delay in the financing required by the plaintiff, the plaintiff was entitled to damages in the sum of RM20,000 to be paid by the defendant. (para 32)

(3) The plaintiff was not entitled to claim the alleged damages that were laid down in its affidavit in support, save for the sum of RM20,000, to compensate the plaintiff for the delay in financing caused by the entry of the caveat over the land. There was no substantive evidence, save for the averments in the plaintiff's affidavit that the project was stopped for six months. In fact, evidence indicated that work had continued. The plaintiff had not shown that it was entitled to the sum of RM101,787 claimed as additional expenses for the six months' period. Substantial parts of the amount claimed were for the items that were incurred even before the caveat was entered, items that were not related to the project, legal fees for another claim incurred by the plaintiff, excessive food and entertainment expenses and even payment to the Inland Revenue Board. These claims did not fall within the category where the defendant was liable to the plaintiff. (paras 21, 22 & 25)

(4) The plaintiff alleged that the sum of RM275,814 constituted potential claims that it may face from the contractors as a result of a delay in the project. There was no evidence of any real claim by the contractors save for a one-page document prepared by the plaintiff. This one-page document did not fulfil the test proving the actual damage caused by the defendant's wrongful act. This was merely speculative and could not be entertained. (para 28)

(5) The plaintiff was not entitled to general damages based on the general value of the land. The value of the land had not been reduced and the amount claimed was merely speculative in nature. (para 30)

Case(s) referred to:

Asia Plywood Company Sdn Bhd v. Aeon Co (M) Bhd & Anor [2020] 3 CLJ 685 HC ***(refd)***

Emas Kiara Sdn Bhd v. Michael Joseph Monteiro & Ors; Farcoll Estate Sdn Bhd & Ors (Interveners) [2018] 8 CLJ 17 CA ***(refd)***

Forest Steel Sdn Bhd v. Iconic Gateway Sdn Bhd & Anor And Another Appeal [2020] 7 CLJ 19 CA ***(refd)***

Lim Tee Hin v. Ledchumanan Nagappan [2004] 3 CLJ 285 HC ***(refd)***

MD Biomedical Engineering (M) Sdn Bhd v. Goh Yong Khai [2021] 6 CLJ 30 CA ***(refd)***
Mentari Sekitar Sdn Bhd v. Heritage Property Sdn Bhd [2016] 3 CLJ 382 CA ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Taki Engineering Sdn Bhd v. Dynasty Streams Sdn Bhd [2015] 1 LNS 1503 CA ***(refd)***
Ting Sieh Chung v. Hock Peng Realty Sdn Bhd [2012] 1 LNS 574 CA ***(refd)***
UEP Properties Bhd v. Woon Nyoke Lin [2002] 3 CLJ 719 CA ***(refd)***

Legislation referred to:
National Land Code, s. 329(1)
Rules of Court 2012, O. 37 r. 4, O. 38 r. 3

For the plaintiff - Palvinder Kaur & Balvinder Singh Kenth; M/s Kenth Partnership
For the defendant - Angkit Sanghvi; M/s G Sandhu, Kabina & Assocs

Reported by Najib Tamby

JUDGMENT

Mohd Arief Emran Arifin JC:

Introduction

[1] This is the plaintiff's application for assessment of damages under s. 329(1) of the National Land Code for the wrongful caveat entered by the defendant over the land held under title number HS(D) 121696, PT 50004, Seksyen 67, Bandar Kuala Lumpur, Daerah Kuala Lumpur.

[2] The said caveat was ordered to be removed after I heard parties on 15 September 2021. My reasoning appears in the grounds that I have delivered in these proceedings. I also directed that that the defendant pays damages to the plaintiff being compensation and/or general damages to be assessed for the loss and/or damage suffered and/or expenses incurred by the plaintiff arising from the said wrongful caveat. The said damages were to be assessed by this court pursuant to the orders entered and pursuant to s. 329 of the National Land Code.

[3] The plaintiff is seeking damages against the defendant for the following:

(i) Loss and expenses incurred by the plaintiff for the six months period when its financing facilities were unavailable and the plaintiff's contractors were not able to proceed with the development works.

(ii) The legal fees and expenses incurred by the plaintiff in respect of the application to remove the caveat.

(iii) General damages to be assessed.

[4] The plaintiff alleges that the defendant should be made to pay the said sums claimed as it had allegedly had to incur further unnecessary costs and expenses that were caused by the caveat. It alleges that as the loan could not

be drawn down during the said six months period, caused by the inability to securitise the loan with the financial institution, the defendant should be made liable for the damages it had caused to the plaintiff.

[5] I note that the caveat persisted over the land for a period from 24 March 2021 to 23 September 2021.

[6] The defendant on the other hand denies that the plaintiff is entitled to the said damages. Learned counsel for the defendant argues that the damages claimed are not caused by the said caveat entered and it would have naturally arisen because of the plaintiff's project. The defendant also contends that these are all projection losses on the part of the plaintiff, and they have not shown actual damages caused by the entry of the said caveat.

Attempt To Seek A Late Trial Of The Assessment Proceedings

[7] The defendant's counsel in his written submissions now contends that there ought to be a trial of the assessment of damages pursuant to O. 37 r. 4 of the Rules of Court 2012.

[8] However, I find that the defendant's counsel has mistakenly forgotten the order that was made by this court on 28 January 2022 where the application for directions was filed by the plaintiff's counsel as to the conduct of the assessment proceedings in encl. 20. There is no order for the assessment to be undertaken by way of a trial and parties had agreed that the proceedings be undertaken through affidavits.

[9] If the defendant had wanted a trial of the said assessment proceedings and sought to cross-examine the deponents or witnesses as suggested by its counsel, then the defendant should have raised this issue at the said notice for directions hearing on 28 January 2022. Failure to do so would mean to me that the defendant agreed that the assessment will be undertaken by affidavit alone.

[10] Furthermore, even if the defendant wanted to cross-examine the deponents of the plaintiff's affidavit, all is still not lost before this hearing. The defendant could have filed an application to cross-examine the deponent of the plaintiff's affidavit under O. 38 r. 3 of the Rules of Court 2012. This was never done. Having failed to raise this issue during the hearing of encl. 20 and having failed to even apply for cross-examination of the deponent of the plaintiff's affidavit, I find this issue a non-starter. I, therefore, dismiss the defendant's preliminary objection as suggested in its written submissions. Perhaps, the counsel for the defendant was not aware of what transpired on 28 January 2022 and the order entered pertaining to encl. 20.

[11] I also find it unusual for the defendant to file a writ of subpoena to call the deponent of the plaintiff's affidavit to testify at the hearing of the assessment proceedings. If indeed that is what counsel wanted to undertake,

he should have filed an application in accordance to O. 38. That was not done and as such, I cannot entertain such request at the hearing of the order for assessment of damages.

Applicable Law On Damages Caused By A Wrongful Caveat

[12] It is trite that s. 329 of the National Land Code provides that a party who has lodged a caveat wrongly over another's property will be liable to pay compensation for any damage or loss that arises from the said wrongful caveat.

[13] The innocent party must however prove that the damages claimed are caused by the entry of the wrongful caveat. This will be assessed in accordance with the principles applicable in the law of torts. As explained by the Court of Appeal in *MD Biomedical Engineering (M) Sdn Bhd v. Goh Yong Khai* [2021] 6 CLJ 30 where Lee Heng Cheong JCA stated:

> [28] In *Lo Foi v. Lee Ah Hong & Ors* (*supra*) the court there also held "damages under s. 329(1) of the National Land Code must be assessed in accordance with the principles of the laws of torts and that would be the reasonable foreseeability test" and "damages sought for would only be recoverable if they come within the range of damages recoverable in law and secondly, if they are not too remote".
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> [29] We are in full agreement with the above principles laid down in *Lo Foi v. Lee Ah Hong & Ors* and applying such principles to the instant appeal, we find that the plaintiff's sole claim for "total legal fees and disbursements of RM70,000" comes within the meaning of "the tortious damage" and the "foreseeability test" as defined by *Lo Foi v. Lee Ah Hong & Ors* (*supra*) and that the claim for the legal fees is not too remote.

[14] I also refer to the decision of the High Court in *Lim Tee Hin v. Ledchumanan Nagappan* [2004] 3 CLJ 285. In that case, Low Hop Bing J (as he then was) stated:

> In my judgment, for the purpose of assessing "compensation to any person or body who thereby suffers any damage or loss" under s. 329(1), on the basis of the aforesaid High Court judgments, the following principles may be culled:
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> (a) The assessment of compensation under s. 329(1) must be undertaken on the facts and circumstances established by way of the evidence adduced before the assessor having regard to the terms of the order for such assessment;
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> (b) The burden is on the claimant to prove real and actual loss: *Cheng Chin Chong v. Shak Heng & Sons Sdn Bhd* [1981] CLJ 91; [1981] CLJ (Rep) 126; *Mawar Biru*, *supra*, *Coke & Coal*, *supra*, *Minty Holdings*, *supra*; *Lo Foi*, *supra*; and *Quill Construction*, *supra*.

(c) The usual approach is by determining in the first instance, whether there is a property value loss in that there is a decrease in the price of the said property after the same is offered for sale subsequent to the caveat being removed: *Mawar Biru*, *supra*; *Coke & Coal*, *supra*. However, in my view, this is not the only approach.

(d) The claimant must prove loss of his own money or loss of use of his own money: *Coke & Coal*, *supra*.

(e) Damages must be assessed in accordance with the principles of the law of torts by reference to the reasonable foreseeability test *ie*, reasonable in law and not too remote: *Lo Foi*, *supra*.

(f) Compensation would include any fee and expenses incurred to get the caveat removed: *Lo Foi*, *supra*; *Quill Construction*, *supra*.

(g) The claimant has the duty to mitigate his loss: *Coke & Coal*, *supra*; *Lo Foi*, *supra*; and *Quill Construction*, *supra*.

[15] I am also grateful that the counsels for the plaintiff and the defendant have referred to the decision of the High Court in *Asia Plywood Company Sdn Bhd v. Aeon Co (M) Bhd & Anor* [2020] 3 CLJ 685; [2020] 8 MLJ 736 and the Court of Appeal in *Ting Sieh Chung v. Hock Peng Realty Sdn Bhd* [2012] 1 LNS 574; [2013] 2 MLJ 90 and *Emas Kiara Sdn Bhd v. Michael Joseph Monteiro & Ors; Farcoll Estate Sdn Bhd & Ors (Interveners)* [2018] 8 CLJ 17; [2018] 5 MLJ 54.

[16] In *Ting Sieh Chung v. Hong Peng Realty* (*supra*), Low Hop Bing JCA held:

> [16] Having distilled the principles from the aforesaid authorities, we are of the view that "actual damage" is actually one of the heads of damages which an aggrieved person such as the plaintiff herein may claim. Section 179 and similarly s. 329(1) do not expressly or by necessary implication preclude or prohibit the plaintiff from claiming for damages, loss of profits or sale at a lower price so long as there is evidence to prove the damages or loss, arising from the entry of the caveat without reasonable cause, as in the instant appeal.
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> [17] Had the defendant not entered the caveat, the plaintiff would have sold the houses or charged them to a bank to raise funds for purposes of development. These are losses of opportunity arising from the defendant's entry of the caveat which had remained for some eight years before the court ordered its removal.

[17] In that case, which is almost similar to the facts of our case, it was also alleged that the registered proprietor of the land could not be developed as financing could not be obtained due to the inability to securitise the land. The caveat prevented the ability of the proprietor from obtaining any loan and prevented the development of the said property. As a result, the Court of Appeal found that the reasoning of the Registrar and eventual confirmation by the High Court for these damages were correct.

[18] I am also reminded by the defendant's counsel that the burden of proof to show that the plaintiff's did suffer any damages as a result of the said caveat lies with the plaintiff. He correctly refers to the decision of Edgar Joseph Jr J in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635. I find that this position is correct, and I agree that the burden lies on the plaintiff to prove that the defendant's caveat had caused damages to it.

[19] However, I do not agree that the damages claimable are limited to the property damages or diminution in value of a property as suggested by the defendant's counsel. He suggests that the damages must relate to the loss in value of the property, and this should not extend to any other form of damages that may arise because of the defendant's caveat. I disagree as the cases referred to earlier and s. 329 of National Land Code, do not state that restriction as suggested by the defendant's learned counsel.

[20] Instead, I opine that if the plaintiff is able to prove that it has suffered damages as a result of the said wrongdoing, and that the said damages are not remote pursuant to the normal rules in tortious claims, the sums claimed ought to be awarded against the defendant.

Application Of The Law To The Facts

[21] Having considered the affidavits filed, I am of the opinion that the plaintiff is not entitled to claim the alleged damages that are laid down in its affidavit in support save for the sum of RM20,000 to compensate the plaintiff for the delay in financing caused by the entry of the said caveat over the land.

[22] I will first deal with the sums claimed of about RM956,614.50. I opine that this alleged damage is not caused by the entry of the caveat on the land. I agree that the caveat did cause a delay in the drawing down of the loan from UOB. However, that does not mean that these expenses were caused by the delay in the project. There is no substantive evidence, save for the averments in the plaintiff's affidavit, that the project was stopped for six months.

[23] In fact, the evidence before me indicates that work had continued. Amendments to the building plans were made, quantity survey work relating to the project and even structural work were billed to the plaintiff. This shows to me that works had undertaken on the project and these are not idling fees as suggested by the plaintiff. There is no evidence of any notice from any contractors or any consultant that they could not continue with the works on the project. Neither did the plaintiff produce any notice from any of the suppliers of any stop work notice or any form of delay during the said six months. As I have indicated, when I peruse the exhibits, it shows that work had continued despite the delay of the said financing as suggested by the plaintiff. If there was a delay to the project, I would have expected that the

plaintiff to produce a notice of extension of time issued by its contractors or consultants and even notice to seek a variation of the amount of work to be compensated by these contractors. Instead, what I find is that the work continued with fees due to the consultants on the said site.

[24] I find that parts of the fees and expenses that were jumbled up together with the other claims in this heading include claims that were not caused by the caveat or any alleged delay in the said works. For example, the claims include JKL Engineering consultancy fees that were made for work relating to LED signs in response to safety concerns raised by DBKL. Also included were photocopying charges, entertainment and alcohol beverages purchased, speakers and soundbars purchased for the showroom and even repair to a car air-cond system. These are surely not idling charges as suggested by the plaintiff. I find that the evidence produced by the plaintiff in exhs. OT-7 falls short of proving that these are in fact idling charges caused by the delay in the project.

[25] I also do not find that the plaintiff has shown to my satisfaction that it is entitled to the sum of RM101,787.90 claimed as additional expenses for the said six months period. I agree with the defendant that substantial parts of the amount claimed were for items that were incurred even before the caveat was entered, items that were not related to the project, legal fees for another claim incurred by the plaintiff, excessive food, and entertainment expenses and even payment to the Inland Revenue Board. Therefore, I do not find that these claims fall within the category where the defendant is liable to the plaintiff. Surely these expenses did not arise or were caused by the caveat entered.

[26] For the claim allegedly for the anticipated loss and expenses for potential claims by contractors, to the sum of RM275,814, I find that this claim is speculative and is not claimable.

[27] As I have stated earlier, it is trite law that the plaintiff must prove the damages claimable against the defendant for the wrongful caveat entered. I have also stated that this will be determined based on the principles that are applicable relating to tortious claims.

[28] The plaintiff alleges that the sum of RM275,814 constitute potential claims that it may face from the contractors as a result of a delay in the project. However, I do not find any evidence of any real claim by the contractors save for the one-page document prepared by the plaintiff in exh. OT-9. This one-page document, in my view, does not fulfil the test proving the actual damage caused by the defendant's wrongful act. This is merely speculative and cannot be entertained by this court. I agree with the defendant's arguments on this claim and therefore reject the plaintiff's claim. It is also wrong for the plaintiff to merely produce a document that it created

to justify the amount claimed as damages. I refer to *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 2 CLJ 635; *Forest Steel Sdn Bhd v. Iconic Gateway Sdn Bhd & Anor And Another Appeal* [2020] 7 CLJ 19; *Sime UEP Properties Bhd v. Woon Nyoke Lin* [2002] 3 CLJ 719; and *Taki Engineering Sdn Bhd v. Dynasty Streams Sdn Bhd* [2015] 1 LNS 1503.

[29] On the issue of costs, I agree that the plaintiff is entitled generally to the full costs that it had to incur because of the application to remove the caveat. However, as I have limited the sums to the amount of RM10,000 in the earlier order, the plaintiff is not entitled to reopen this issue again. Otherwise, this may be tantamount to an attempt to reopen the same issue that has been dealt with by this court earlier. The plaintiff should have insisted on the full costs claimable against the defendant on a solicitor-client basis at the hearing of the application to remove the caveat. I do not wish to fall foul of the rule of *res judicata* on this issue of costs of proceedings as that was dealt with earlier.

[30] On the final issue of general damages on the value of the land, I agree with the defendant's arguments. I do not believe that he is entitled to these damages based on the general value of the land. I am guided by the decision of the Court of Appeal in *Mentari Sekitar Sdn Bhd v. Heritage Property Sdn Bhd* [2016] 3 CLJ 382; [2016] MLJU 1604. The value of the land has not been reduced, and the amount claimed is merely speculative in nature. It would have been different if the plaintiff is able to show the number of losses that arise as a result of an aborted sale or aborted project development.

[31] I am aware that the plaintiff contends that this would have been the estimated amount of profits if the project had continued in time. However, I find it is speculative and not claimable against the defendant. The said project has not borne full fruition and it would be wrong for me to award such general damages based on the estimation of the plaintiff at this stage. As I said earlier, the evidence before me indicates that the project had continued and there is no evidence of any delay as suggested by the plaintiff.

[32] Nonetheless, I agree that the defendant's caveat should not have been entered on the land. I find it was not entered *bona fide* with true intention to protect any registrable interest in line with the National Land Code. There is no other conclusion I could make but find that the caveat entered was intended to scuttle the project in view of the defendant's grouses with the plaintiff. Therefore, I find that as the defendant did cause a delay in the financing required by the plaintiff and the plaintiff is entitled to damages to the sum of RM20,000 to be paid by the defendant.

A **Orders Entered**

[33] For the above reasons, I make the following order:

(i) The defendant is directed to pay the plaintiff the sum of RM20,000 as damages caused by the wrongful caveat.

B (ii) Interest at the rate of 5% on the said sums from the date of this order to the date of full payment by the defendant to the plaintiff.

(iii) Costs of this application RM5,000 subject to allocator.

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